



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

(petitioner)  
c/o Attorney Benjamin Adams  
301 Nicolet Boulevard  
Neenah, WI 54956-2788

DECISION

MRA-70/47970

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**PRELIMINARY RECITALS**

Pursuant to a petition filed January 26, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Winnebago County Dept. of Social Services in regard to Medical Assistance, a telephone hearing was held on February 26, 2001.

The issue for determination is whether petitioner's assets may be allocated to his community spouse to increase her monthly income.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

(petitioner)  
c/o Attorney Benjamin Adams  
301 Nicolet Boulevard  
Neenah, WI 54956-2788

Respondent:

Wisconsin Department of Health and Family Services  
Division of Health Care Financing  
1 West Wilson Street, Room 250  
P.O. Box 309  
Madison, WI 53707-0309

By: Jean Krings, ESS  
Winnebago County Dept Of Human Services  
220 Washington Ave.  
PO Box 2925  
Oshkosh, WI 54903-2925

**EXAMINER:**

Kenneth P. Adler  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. Petitioner (SSN 396-14-3985, CARES #1109945311) is a resident of Winnebago County. Petitioner was admitted to a skilled nursing facility during February 2000.

#### **May 2000 Application**

2. On 05/16/00 the county worker completed an intake appointment for MA for petitioner. Petitioner is a resident of a skilled nursing facility.
3. At the time of application, petitioner and his spouse had the following assets:

	Petitioner	Community Spouse
Life Insurance	\$ 2,700	
Checking account	\$ 413	\$ 167
Savings accounts	\$ 4,860	\$34,968
Cash	\$ 8	\$ 40
Burial Trust	\$ 7,309	\$ 7,234
Certificate of Deposit	\$26,651	\$36,967
Stocks		\$18,528
Total for each	\$31,932	\$90,670
Total		\$122,602

4. The county agency completed an **asset assessment** for the couple under the existing provisions of the spousal impoverishment program. The asset assessment calculated the Community Spouse Asset Share (CSAS) at \$61,301. This amount combined with a \$2,000 asset share for the institutionalized spouse, resulted in the determination petitioner and his spouse could have no more than \$63,301 in combined assets to be MA eligible.
5. Petitioner has monthly income of \$1,091.73. The community spouse has monthly income of \$1037.19. The agency completed an **income allocation** and concluded the community spouse was eligible for a Community Spouse Income Allocation (CSIA) of \$837.81 from petitioner. After this allocation, petitioner was left with a patient liability (cost of care contribution) of \$213.92. Exhibit 4
6. When processing petitioner's spousal impoverishment MA application, the county agency followed the directives of Wis. Stat. S. 49.455 and MA Handbook, Appendix 23.4.1. Those authorities require an agency to utilize an "income-first" process when determining MA eligibility.
7. On 06/08/00 the Court of Appeals for District IV issued *Blumer v. Wisconsin DHFS*. The issue was whether Wisconsin law requiring the department to use an "income-first" rule instead of a "resource-first" when determining whether to increase a community spouse resource allowance conflicted with federal provisions. The court concluded Wisconsin's "income-first" rule was in direct conflict with federal law. The decision was recommended for publication.
8. On 06/30/00 the county agency issued a notice explaining the MA application had been denied as petitioner and his spouse exceeded the MA asset limit which had been established at \$63,301. Countable assets were listed as \$122,602.00. Exhibit 3
9. On 07/26/00 the decision in *Blumer* was ordered published by a review committee. The decision was actually published on 08/08/00.

### December 2000 Application

10. On 12/27/00 petitioner again applied for spousal impoverishment MA seeking backdating of MA eligibility to September 2000.

11. During September 2000 petitioner and his spouse had the following assets:

Petitioner:		Community Spouse	
Cash	\$ 8.00	Cash	\$ 40.00
Bank One (checking)	\$ 323.18	Bank One (checking)	\$ 537.66
Bank One (money market)	\$5718.67	Bank One (money market)	\$3464.76
CD (#9914)	funeral	CD (#2016)	\$5096.48
CD (#9915)	funeral	CD (#7204)	funeral
<u>Bank One Annuity</u>	<u>\$5136.83</u>	CD (#7205)	funeral
		CD (#9911)	\$9111.38
		CD (#9917)	\$8033.39
		CD (#9940)	\$6000.00
		CD (#0164)	\$10000.00
		Bank One securities	\$35325.12
		M&I Stock	\$18478.50
		<u>WPS Stock</u>	<u>\$ 134.25</u>
Total	\$11,186.68	Total	\$96,221.74

12. The combined total of petitioner and the community spouse's assets is \$107,408.42 so Community Spouse Asset Share (CSAS) was established at \$55,704.21 (\$53,704.21 + \$2,000).

13. The couple has the following monthly income:

Petitioner:		Community Spouse	
Social Security	\$1040.00	Social Security	\$ 482.00
Lincoln Annuity (pension)	\$ 43.73	Bank One (checking)	\$ 1.00
Bank One (annuity)	\$ 31.72	Bank One (money market)	\$ 6.50
Bank One (checking)	\$ 1.00	Bank One (#2016)	\$ 27.77
<u>Bank One (money market)</u>	<u>\$ 10.63</u>	Bank One (#9911)	\$ 37.05
		Bank One (#9917)	\$ 32.67
		Bank One (#9940)	\$ 24.40
		Bank One (#0164)	\$ 46.58
		Bank One securities	\$ 155.05
		M&I Stock	\$ 33.66
		WPS Stock	\$ .84
		<u>Larson Coop Patronage</u>	<u>\$ 1.00</u>
Total	\$1,135.08	Total	\$ 848.52

14. On 01/18/01 the county agency issued a notice of decision stating petitioner's MA application seeking MA and requesting backdating to September 2000 was denied as the couple's assets exceeded the MA asset limit. Exhibit 1

### DISCUSSION

The first issue in this case concerns the MA eligibility of petitioner based upon spousal impoverishment guidelines including both: (1) a couple's asset allowance which determines the community spouse's

community Spouse Asset Share (CSAS) and (2) the community spouse's Community Spouse Income Allocation (CSIA) in relation to the Minimum Monthly Maintenance Needs Allowance (MMMNA).

## **I. LEGAL BACKGROUND**

The federal Medicare Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases the institutionalized spouse resides in a nursing facility and "community spouse" refers to the person married to the institutionalized individual. Wis. Stat. §49.455(1). As a general rule, no income of a spouse is considered to be available for use by the other spouse during any month in which that other spouse is an institutionalized spouse. Wis. Stat. § 49.455(3).

The MCAA also established a new minimum monthly maintenance needs allowance (MMMNA) for the community spouse at a specified percentage of the federal poverty line. This amount is simply the amount of income considered necessary to maintain the community spouse in the community. A community spouse may, however, prove through the fair hearing process that he or she has financial need above the MMMNA based upon exceptional circumstances resulting in financial duress. Wis. Stat. § 49.455.

## **II. MA HANDBOOK PROVISIONS**

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are instructed to review the combined assets of the institutionalized spouse and the community spouse. MA Handbook, Appendix 23.4.1. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial is exempt from the determination. The couple's total assets are then compared to the asset allowance to determine eligibility.

MA Handbook, Appendix 23.4.1, explains the eligibility determination process: First, a Community Spouse Asset Share (CSAS) is calculated as follows: (1) If the couple's total countable assets are \$168,240 or more, the Community Spouse Asset Share (CSAS) is \$84,120; (2) If the couple's total countable assets are less than \$168,240 but greater than \$100,000, the CSAS is 1/2 of the total countable assets of the couple; and (3) if the total countable assets of the couple are \$100,000 or less, the CSAS is \$50,000. Wis. Stat. § 49.455(6)(b)3. MA Handbook, Appendix 23.4.2.

Second, \$2,000 (the MA asset limit for the institutionalized individual) is then added to the CSAS to determine the total asset allowance for the couple. As a general rule, if the couple's assets are at or below the determined asset allowance, the institutionalized spouse is eligible for MA. If the assets exceed the asset allowance calculated for the couple, the institutionalized spouse is not MA eligible.

As an exception to this general rule, the asset allowance may be increased, through the fair hearing process, if income-producing assets exceeding the asset allowance are necessary to raise the community spouse's income to the minimum monthly needs allowance. For the time period relevant to this appeal, the MMMNA was defined as the lesser of \$2,103 or \$1,875 plus excess shelter costs. MA Handbook, Appendix 23.6.0.

## **III. STATE STATUTE PROVISIONS**

Wis. Stat. § 49.455(6)(b)3, states as follows:

**(6) Permitting transfer of resources to community spouse.** (a) Notwithstanding s. 49.453(2), an institutionalized spouse may transfer an amount of resources equal to the community spouse resource allowance determined under par. (b) to, or for the sole benefit of, the community spouse without becoming ineligible for medical assistance for the period

of ineligibility under s. 49.453(3) as a result of the transfer. The institutionalized spouse shall make the transfer as soon as practicable **after the initial determination of eligibility for medical assistance**, . . .

(b) The community spouse resource allowance equals the amount by which the amount of resources otherwise available to the community spouse is exceeded by the greatest of the following: . . .

3. The amount established in a fair hearing under sub. (8)(d).

Subsection (8)(d) provides as follows:

If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). **Except in exceptional cases which would result in financial duress for the community spouse, the department may not establish an amount to be used under (6)(b)3 unless the institutionalized spouse makes available to the community spouse the maximum monthly income allowance permitted under sub. (4)(b).** . . . (Emphasis added.)

Based upon the above, an administrative law judge is allowed to bypass the asset allowance limit by determining assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs income allowance for the community spouse. Therefore, the above provision has been interpreted to allow an administrative law judge to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the asset allowance. See MED-62/94792, MED-36/93977.

However, Wisconsin statutes direct the department to require the institutionalized spouse to *first* make all his *income* available to his community spouse before additional *assets* above the CSAS (asset allowance) are allowed to be retained by the community spouse to raise her income to the MMMNA.

Prior decisions of this office have explained the spousal impoverishment MA processing as follows:

. . . In this particular case I must conclude I do not have the authority to order assets retained exceeding the asset allowance based upon the assertion the community spouse requires those assets to raise his monthly income to the minimum monthly maintenance needs allowance. The reason is the institutionalized spouse has monthly income of \$1,262.71 which, combined with the community spouse's monthly income of \$1,702.45 equals \$2,965.16. In most cases, spouses **combined** income does not rise to the minimum monthly maintenance needs allowance.

The MA Handbook provisions cited above are directives to the county economic support workers who are responsible for the initial processing of MA applications. Once a county worker has denied an application due to excess assets, the state statutes grant jurisdiction to an administrative law judge to review the matter and allow an increase in assets in certain circumstances. As I read the underlined portion of sub. (8)(d) referenced above, the institutionalized spouse must make available to the community spouse the amount necessary to raise the community spouse income to the monthly needs allowance **prior to the resource allocation request**. Therefore, a resource allowance via a fair hearing under (6)(b)3 is only an option if the institutionalized spouse transfers all

available income (less the relevant allowances) to the community spouse, and the community spouse's income remains below the minimum monthly maintenance needs allowance.

As the state statutes are the controlling legal authority in this particular case, I must follow the directives of sec. 49.455(8)(d) in determining the petitioner must first make her income available to the community spouse. As the couple's total monthly income exceeds \$2,400 **even without the asset income listed in Finding of Fact #7**, it appears upon allocation of the institutionalized spouse's income no assets would need be retained to generate income for the community spouse.

See MED-23/12842

However, the Wisconsin Court of Appeals, in *Blumer v. DHFS*, 2000 WI App 150, 237 Wis. 2d 810, \_\_ N.W. 2d \_\_, concluded that the final sentence of Wis. Stat. s. 49.455(8)(d) (highlighted above) violated the mandate of the federal MCCA law. The *Blumer* court held that an administrative law judge must first allocate resources to maximize the community spouse's income, and only if the income generated by those resources does not bring the community spouse's income up to the MMMNA can the institutionalized spouse's income be allocated. The *Blumer* decision is on appeal to the United States Supreme Court, but currently it is the law that must be followed.

The result in this case is as follows. Petitioner's wife has sole monthly income of \$848.52 including her Social Security of \$482 per month and the income from her assets which are all generating a reasonable rate of return. See Finding of Fact #14. Using only this income, petitioner's wife is \$1026.48 below the MMMNA of \$1,875. Therefore, I conclude it is necessary she be allowed to retain assets above the CSAS of \$55,704.21 in order to generate income to reach the MMMNA of \$1,875.

Based upon the *Blumer* decision, petitioner's *assets* which are generating a reasonable rate of return must *first* be allocated to the community spouse to attempt to raise her monthly income to the MMMNA. The monthly income generated by petitioner's assets is \$43.35. Therefore, in addition to all her husband's assets, the community spouse is also eligible to receive all her husband's assets which generate income of \$43.35 and increase her monthly income to \$891.87. As she still remains below the MMMNA of \$1,875 petitioner is also eligible to receive \$983.13 of her husband's monthly income. See Finding of Fact #14. This raises the community spouse's monthly income to \$1875 and results in petitioner paying the nursing home \$111.95 (\$151.95 - \$40 personal allowance).

### **CONCLUSIONS OF LAW**

All assets of petitioner and his wife must be allocated to his wife to maximize her monthly income.

**NOW, THEREFORE, it is**

**ORDERED**

***That the matter be remanded with the following instructions: (1) increase the community spouse asset share to \$107,408.42; and (2) certify petitioner eligible for MA effective September 1, 2001. The agency shall take these actions within ten (10) days of the date of this decision.***

### **REQUEST FOR A NEW HEARING**

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of  
Madison, Wisconsin, this \_\_\_\_\_ day  
of \_\_\_\_\_, 2001.

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Division of Hearings and Appeals  
79/

cc: WINNEBAGO COUNTY/NEENAH  
DHFS - Susan Wood